CASE NBR: [881053431 CSH STATUS: [ ]
SHORT TITLE: [Farmer, Robert J.]
VERSUS [Sumner, Director, etc.] DATE DOCKETED: [082288]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Aug 22 1988		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Sep 20 1988		Order extending time to file response to petition until October 11, 1988.
Oct 7 1988		Brief of respondent George Sumner, Director in opposition filed.
Oct 20 1988		DISTRIBUTED. November 4, 1988
Oct 24 1988		Reply brief of petitioner Robert J. Farmer filed.
Feb 21 1989		REDISTRIBUTED. February 24, 1989
Feb 27 1989		Petition DENIED. Brennan and Marshall dissenting: Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Command:[ ]

No. 88 5348

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

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ROBEPT J. FARMER, Petitioner,

v.

DIRECTOR OF NEVADA DEPARTMENT OF PRISONS,

Respondent.

Supreme Court, U.S.
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PETITION FOR A WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

TERRI STEIK ROESER
Nevada State Public Defender

JEFFREY M. EVANS*
Appellate Deputy
308 N. Curry, Room 200
Carson City, Nevada 89710
Phone: (702) 885-4880

ATTORNEYS FOR PETITIONER

*Counsel of Record

QUESTION PRESENTED

Does this Court's decision in Booth v. Maryland, 482 U.S. _____ (1987), barring the use of victim impact statements at capital sentencings, apply retroactively to cases pending on collateral review on the date Booth was decided?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROBERT J. FARMER, Petitioner,

v.

DIRECTOR OF NEVADA DEPARTMENT OF PRISONS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE NEVADA SUPREME COURT

The petitioner, Robert Jeffrey Farmer, respectfully prays that a writ of certiorari issue to review the order of the Nevada Supreme Court dismissing his appeal, entered in the proceeding below on March 31, 1988, and the order denying rehearing, which was entered on June 23, 1988.

OPINIONS BELOW

The written opinion of the Nevada Supreme Court, its Order Dismissing Appeal, is unreported and is reproduced in the appendix hereto, p. 1a, infra. The subsequent order denying reconsideration is also unreported and is reproduced in the appendix hereto, p. 7a, infra.

JURISDICTION

The Nevada Supreme Court's Order Dismissing Appeal was filed on March 31, 1988, and its Order Denying Reconsideration was filed on June 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

On March 26, 1984, petitioner Robert Farmer (hereafter "Farmer") pleaded guilty to the murder of Greg Gelunas, which had occurred in Las Vegas, Nevada on January 19, 1982. The State of Nevada sought the death penalty, and a penalty hearing was held before a three-judge panel on May 10 and 11, 1984.

At the hearing, the state prosecutor argued for imposition of the death penalty and, in support of his argument, relied on two distinct items of "victim impact" information.

The first item related to the impact of the Gelunas murder on the victim's mother. At the close of his evidence at the penalty phase, the prosecutor indicated that he was not calling the victim's mother to testify "because of her mental state." Record on Appeal (Vol.II) at 513, Farmer v. Director, No. 18052 (Nev. S.Ct.). He reported the following concerning the impact of the crime on the victim's mother:

> You cannot talk to her about this case to this day, -- this occurred two and-a-half years ago. To this day when you talk to her about it she will break down and cry. I mean each and every time. It has had an extreme emotional impact on this woman.

Id. Again, in his final argument to the sentencing panel, the prosecutor stressed the impact of the murder on the victim's mother:

> It is not only the lives that he [Farmer] took. It is the very personality, the profile of this particular individual that I am asking to terminate. I'm asking that this Court terminate his life.
>
> I did not call Greg Gelunas' mother, as I previously indicated. I spoke to her just last night. But I can tell the Court that not only did he kill two human beings, he certainly shattered some other lives psychologically.
>
> And, of course, that happens any time a human being is killed, I suppose. And I can't isolate this case as being any exception.
>
> But it is an exception in the sense that there were two killings. And so we simply double the number of people, other people who were killed -- I'm sorry. Who were injured as a result of Mr. Farmer's actions.
>
> Mrs. Gelunas, I can represent to the Court, is an extremely emotionally distraught woman, to this day. She, to this date, she has doctor's help. To this date, she, at least reports to me, to have repeated nightmares, crying, and I can see the crying for myself. Extremely emotionally traumatic.

> And Mr. Farmer, I'm certain in his mind, never gave it a thought. Never thought about the victims. Never gave the families of the victims, a thought.

Id. at 620. Farmer's attorney made no objection to the prosecutor's reference to the impact of the murder on Mrs. Gelunas. Likewise, Farmer's attorney made no objection to the above reference to two killings -- even though one of them was a homicide unrelated to the Gelunas murder.

The second item of victim impact information the prosecutor relied on concerned a kidnapping unrelated to the Gelunas murder. One Linda Cobb testified that on January 16, 1982, three days before the Gelunas murder in Las Vegas, Farmer stole her car and kidnapped her and her 13-year old son near Reno, Nevada. The prosecutor asked Mrs. Cobb, "Has this episode had any affect [sic] on you . . . . ? Mrs. Cobb replied that Farmer "could have absolutely destroyed [her] life . . . . " She reported changing her job, residence, and automobile. Id. at 445. The prosecutor then asked about the effect of the kidnapping on her son. Mrs. Cobb gave the following reply:

> Well, I'm not a child psychology expert. However I don't know if it's relatable to his age or something that is a result of this incident. But we are having problems with my son and he is now living with my ex-husband in an effort to try and find out what is wrong.

Id. at 445-446. Farmer's attorney did not object to this

testimony.

The three-judge panel subsequently sentenced Farmer to "be punished by death." The Nevada Supreme Court affirmed his conviction and sentence on direct appeal on August 27, 1985. Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985). Farmer then petitioned this Court for a writ of certiorari, which was denied on May 19, 1986.

On September 19, 1986, Farmer filed a state petition for a writ of habeas corpus challenging his conviction and sentence. The state district court denied relief by an order entered on March 20, 1987. Farmer filed a timely appeal to the Nevada Supreme Court.

Between the filing of Farmer's notice of appeal (April 6, 1987) and the filing of his opening brief in the Nevada Supreme Court (July 22, 1987), this Court decided Booth v. Maryland, 482 U.S. _____ (decided June 15, 1987) and forebade the use of victim impact statements in capital sentencing proceedings.

In his opening brief, filed about five weeks after Booth, Farmer raised for the first time the question whether the use of victim impact information at his sentencing violated the eighth amendment. Appellant's Opening Brief at 21, Farmer v. Director, No. 18052 (Nev. S.Ct.). In its answering brief, Respondent candidly stated, "There is no question that some of the statements and evidence presented to the three-judge panel at the penalty hearing were inappropriate under the recent decision

in Booth v. Maryland." Respondent's Answering Brief at 15, Farmer v. Director, supra (filed September 9, 1987).

Noting that Farmer's sentence was affirmed on direct appeal before Booth, the Nevada Supreme Court declined to apply Booth retroactively. The court stated, "The United States Supreme Court has not defined the limits of retroactive application of the Booth decision, and absent the high court's direction we will not extend the application of that decision to the degree which reversal [of] this case would require." Farmer v. Director, No. 18052, Order Dismissing Appeal at 2-3 (March 31, 1988) (reproduced in appendix infra).

In the instant petition, Farmer seeks review of the Nevada Supreme Court's refusal to apply Booth to his case absent this Court's direction.

REASONS FOR GRANTING THE WRIT

I. THE NEVADA SUPREME COURT DECLINED TO APPLY BOOTH V. MARYLAND TO THIS CASE EXPRESSLY BECAUSE THIS COURT HAS NOT YET RULED REGARDING BOOTH'S RETROACTIVE APPLICATION TO PENDING HABEAS CORPUS CASES.

In Booth v. Maryland, 482 U.S. ____, 96 L.Ed 2d 440, 107 S.Ct. 2529 (1987), this Court held that the introduction of victim impact information at the penalty phase of a capital trial violates the eighth amendment. As discussed in the Statement of the Case, supra, Farmer was sentenced to death after the

sentencing panel received victim impact information concerning the Las Vegas murder for which he was being tried as well as victim impact information concerning unrelated prior crimes. Before the Nevada Supreme Court, on appeal from the denial of post-conviction relief, Respondent conceded that "there is no question that some of the statements and evidence presented to the three-judge panel at the penalty hearing were inappropriate under the recent decision in Booth v. Maryland." Respondent's Answering Brief at 15, Farmer v. Director, No. 18052 (Nev. S.Ct.). Noting that Farmer's conviction was affirmed on direct appeal before Booth was decided, the Nevada Supreme Court nevertheless declined to apply Booth, saying as follows: "The United States Supreme Court has not defined the limits of retroactive application of the Booth decision, and absent the high court's direction we will not extend the application of that decision to the degree which reversal [of] this case would require." See Order Dismissing Appeal at 2-3 (reproduced in appendix), citing Solem v. Stumes, 465 U.S. 638 (1983). The Nevada Supreme Court in effect held that Booth would not apply retroactively to a capital case where the conviction was affirmed on direct appeal before the date Booth was decided.

Neither in Booth nor in any subsequent case has this Court decided whether Booth will be given full retroactive application. Farmer submits that this case merits review by this Court so that the question of Booth's retroactive application can

be resolved. The Nevada Supreme Court has allowed Farmer's death sentence to stand even though it was obtained in violation of the eighth amendment, as explicated by Booth. Assuming Booth is given full retroactive application, the Nevada Supreme Court's decision upholding Farmer's sentence is in conflict with Booth. The question of Booth's retroactivity is a question that has not, but should be, settled by this Court.

II. ALLOWING FARMER'S DEATH SENTENCE TO STAND, PROCURED AS IT WAS THROUGH THE USE OF VICTIM IMPACT INFORMATION, CONFLICTS WITH THE RULE OF BOOTH V. MARYLAND.

As discussed in the Statement of the Case, supra, Farmer was sentenced to death after the sentencing panel received victim impact information. This information can be divided into two categories: (1) the impact of the Gelunas murder on the victim's mother; and (2) the impact of an unrelated prior kidnapping and robbery on a different victim and her son.

Under Booth v. Maryland, a death sentence based on victim impact information violates the eighth amendment. The first category of victim impact information relied on here, the impact of the crime on the murder victim's mother, is exactly the type of information Booth forbids. In Booth, this Court held that the "emotional impact of the crimes on the family" is "irrelevant to a capital sentencing decision." 96 L.Ed.2d at 448.

The second category of victim impact information, the testimony regarding the impact of a prior and unrelated kidnapping and robbery, is even more objectionable. The principle underlying Booth is that a capital sentencing decision must be based on the character of the accused and the circumstances of the crime for which he is being sentenced. Booth, 96 L.Ed.2d at 448, quoting Zant v. Stephens, 462 U.S. 862, 879 (1983). Any other factor considered by the sentencing body must bear on the accused's "'personal responsibility and moral guilt.'" Id., quoting Enmund v. Florida, 458 U.S. 782, 801 (1982). The victim impact of Farmer's unrelated prior offenses is even less relevant than the victim impact of the crime for which he was being sentenced. Since Booth forbids the latter type of victim impact information, it must necessarily by implication forbid the former: the impact of prior unrelated crimes was wholly irrelevant to the decision whether to sentence Farmer to death for the Gelunas murder. Farmer's death sentence was, therefore, obtained in violation of Booth.

Although the Nevada Supreme Court did not reach the issue, some lower courts have refused to apply Booth where, as here, the sentencing decision was made by a judge, not a jury. E.g., State v. Post, 32 Ohio St.3d 380, 513 N.E.2d 754 (Ohio 1987), cert. denied sub nom. Post v. Ohio, ____ U.S. ____, 108 S.Ct. 1061 (1988). These cases are wrongly decided. The creation by these lower courts of a "judge's exception" is

inconsistent with Booth. The precise holding in Booth is stated in the first paragraph of section III of the Opinion: "[T]he introduction of a VIS at the sentencing phase of a capital murder trial violates the eighth amendment . . . ." 96 L.Ed.2d at 452. The holding in Booth was unqualified and not limited to those cases where the sentencing body is a jury. If victim impact information is irrelevant to a capital sentencing decision, it remains irrelevant regardless of whether the judge or jury makes the decision. In this case, the prosecutor introduced significant victim impact information and argued for the death penalty based upon that information. Nothing in the record below suggested that the three-judge panel sentencing Farmer to death was immune to this type of appeal or that the panel assigned the victim impact information no weight in its deliberations. As in Booth, there is too great a risk that Farmer's death sentence is "based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process.'" Booth, 96 L.Ed. at 448, quoting Zant v. Stephens, 462 U.S. at 885. See also Post v. Ohio, ____ U.S.____, 108 S.Ct. 1061, 1062-1063 (1988) (Marshall, J., dissenting from the denial of certiorari).

Farmer's sentence of death cannot stand - if Booth applies retroactively to his conviction. The question of Booth's retroactivity is taken up next.

III. BOOTH V. MARYLAND SHOULD BE GIVEN COMPLETE RETROACTIVE EFFECT, THAT IS, IT SHOULD APPLY EVEN TO CASES PREVIOUSLY AFFIRMED ON DIRECT APPEAL.

This Court announced its decision in Booth on June 15, 1987. Had Farmer's case been pending on direct appeal at that time, Booth would apply to this case as a matter of course. See Griffith v. Kentucky, 479 U.S. ____, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987). The problem is that Farmer's conviction was affirmed on direct appeal in August 1985. After losing his direct appeal, Farmer filed a petition for writ of certiorari with this Court which was denied on May 19, 1986. Subsequently, in September 1986, Farmer filed a petition for writ of habeas corpus in state court. He did not receive a final decision on his petition until March 1987. On April 6, 1987, Farmer filed a timely notice of appeal to the Nevada Supreme Court. His opening brief in the Nevada Supreme Court was filed on July 22, 1987.

Between the time Farmer filed his notice of appeal from the denial of his habeas corpus petition (April 6, 1987) and the time he filed his opening brief in the Nevada Supreme Court (July 22, 1987), this Court announced its decision in Booth (June 15, 1987). Farmer raised his claim under Booth for the first time in his opening brief.

The Booth decision should be available to Farmer in collaterally attacking his sentence for the reasons set forth below.

A. Booth v. Maryland Applies Retroactively Because It Did Not Announce A New Constitutional Rule But Merely Applied Settled Legal Principles To A Particular Factual Setting.

If the holding of a new decision of this Court merely involves the application of "settled precedents" to a new and different factual setting, it is a "foregone conclusion" that the holding will apply retroactively. United States v. Johnson, 457 U.S. 537, 549 (1982). More precisely, in such a situation, the holding will apply even to state habeas petitioners (like Farmer) whose convictions were final before the decision in question. Yates v. Aiken, 484 U.S. ____, 98 L.Ed.2d 546, 108 S.Ct. 534 (1988).

Booth did not announce a new rule at all: it merely involved the application of existing principles to the particular facts presented in that case. In holding victim impact information inadmissible in a capital sentencing proceeding, the Court relied on the "well-settled" principle that the sentencing body's discretion must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Booth 96 L.Ed.2d at 448, quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Further, this Court relied on its more specific holding that the sentencing body must make an "individualized determination" of

whether to impose death on the defendant based on "the character of the individual and the circumstances of the crime." Id., quoting Zant v. Stephens, supra (emphasis in original). In Booth, this Court merely decided, for the reasons stated in that opinion, that the principle announced in Gregg and amplified in Zant and other cases prohibits the use of victim impact information in a capital sentencing proceeding. These principles were established well before Farmer's trial and conviction in 1984. Thus, Booth was not a novel holding and no "real question" of retroactivity is raised. Johnson, 472 U.S. at 549. As a matter of course, the result reached in Booth is the result to be reached in all cases, even those where the convictions were final at the time Booth was decided.

B. Assuming Arguendo That Booth v. Maryland Did Announce A New Rule, Then It Should Still Be Fully Retroactive.

Even assuming that Booth did announce a new rule raising a "real question" of retroactivity, Booth should still apply retroactively to cases like Farmer's, where the death sentence was affirmed on direct appeal before the date Booth was decided.

The methodology to be used to decide the retroactive application of a new holding to such cases is unclear. Traditionally, this Court has used a three-pronged analysis

derived from Linkletter v. Walker, 381 U.S. 618 (1965) to decide the scope of a holding's retroactivity. In the very recent past, individual Members of this Court have urged adoption of an approach, identified with Justice Harlan, in lieu of the Linkletter test. E.g., Griffith v. Kentucky, 93 L.Ed.2d at 662 (Powell, J., concurring). Last term, this Court left undecided the question of which of these two approaches is the appropriate one for deciding whether to apply a new holding to collateral attacks on already final criminal convictions. See Yates v. Aiken, 98 L.Ed.2d at 553.

Virtually every criminal law decision of this Court raises a question regarding the extent of its retroactive application. The Court has resolved this problem in part by adopting a "bright line" rule that makes new holdings retroactive in all cases pending on direct appeal. Griffith v. Kentucky, 93 L.Ed.2d. at 661. The motivating force behind this decision was, apparently, the desire to avoid the troublesome and often inquitable case-by-case approach of Linkletter. Id. at 658-659 and 661. With reference to applying a new decision to pending habeas corpus cases, however, this Court has not resolved whether to adhere to the Linkletter approach or to adopt "Justice Harlan's theory." Yates, 98 L.Ed.2d. at 553.

One of the important issues to be addressed in briefs

on the merits in this case would, therefore, be which of these approaches should be used to determine the retroactivity of Booth's application to a previously final conviction. See also Teague v. Lane, ____ U.S. ____, 108 S.Ct.1106 (1988) (granting certiorari in case presenting question of retroactive application to case pending on collateral review).

The Linkletter approach would militate in favor of giving Booth full retroactive effect. Under that approach, this Court would determine the scope of a new decision's retroactivity by "weigh[ing] the merits and demerits in each case." Linkletter, 381 U.S. at 629. Specifically, the Court evaluates these three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Allen v. Hardy, 478 U.S. 255, 258 (1986) (preliminary print). The first one, the purpose to be served by the new constitutional rule, is the most important of the three. Desist v. United States, 394 U.S. 244, 249 (1969). Thus, "[c]omplete retroactive effect is most appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials." Solem v. Stumes, 465 U.S. 638, 643 (1984).

If this Court grants the requested writ, the parties in

this case as well as any amici can address each of the three factors in detail. Preliminarily, Farmer contends that the first factor would be particularly weighty here and, indeed, decisive in favor of Booth's full retroactive application.

The purpose of the rule in Booth is to "enhance the accuracy of criminal trials." See Solem, 465 U.S. at 643. More specifically, Booth is designed to prevent arbitrary and capricious imposition of the death penalty, that is, it is designed to help prevent the ultimate penalty from being imposed in violation of the eighth amendment. Death is a "punishment different from all other sanctions." Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.). If a sentence of death is wrongly imposed and executed, there is no remedy. It is therefore critical that capital sentencing decisions be accompanied by the highest safeguards to prevent an inappropriate sentence of death. Given the paramount importance of the first Linkletter factor in capital cases, the balance should tip in favor of giving Booth full retroactive application.

Witherspoon v. Illinois, 391 U.S. 510 (1968) is instructive on this point. There, this Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death

penalty . . . ." 391 U.S. at 522. Using the Linkletter approach, this Court indicated its holding was to be given "fully retroactive application." 391 U.S. at 523 n.22. The Court reasoned that, notwithstanding the second and third Linkletter factors, the forbidden jury selection practice "necessarily undermined 'the very integrity of the . . . process' that decided the petitioner's fate . . . ." Id. Similarly, introduction of victim impact information necessarily undermined the integrity of the process that decided Farmer's fate. Booth, 96 L.Ed.2d. at 448. Consistent with Witherspoon, Booth should be given complete retroactive application under the Linkletter test.

Even were this Court to reject the Linkletter approach, Booth should still apply retroactively to Farmer's case. At this point in the development of retroactivity case law, the major alternative approach to Linkletter is "Justice Harlan's theory." See Yates, 98 L.Ed.2d. at 553. Under this approach, the general rule is that a "newly-announced constitutional rule should not be applied retroactively to cases pending on collateral review." Id. Assuming arguendo that Booth announced a novel holding, Farmer would be precluded from invoking Booth under Justice Harlan's general rule because his case is pending on collateral review rather than on direct appeal.

The general rule does admit of exceptions, however. One exception is where the holding is "implicit in the concept of

ordered liberty." Yates, 98 L.Ed.2d. at 553. A new holding within this exception will be given full retroactive effect because fundamental fairness so requires. Solem v. Stumes, 465 U.S. at 653, esp. n.4 (Powell, J., concurring).

Fundamental fairness requires the full retroactive application of the rule of Booth. At the foundation of any civilized legal system is the tenet that similarly situated persons should be treated alike. If Booth is not given full retroactive effect, then a legally-drawn line divides persons sentenced to death based on victim impact information. On one side of that line would be the persons whose convictions were not final when Booth was announced. These persons could claim Booth's protection. On the other side of the line are those whose convictions, like Farmer's, were final before the date Booth was decided. Refusing to give Booth full retroactive effect would deny this latter group Booth's protection - and it would deny that protection, letting them be executed, for no reason other than the fact that their convictions were final before Booth was decided. The underlying constitutional problem with using victim impact information remains the same, regardless of the date on which a capital defendant's conviction became final: a death sentence, regardless of the date of its entry or the date on which it became final, remains infected with "constitutionally unacceptable" error if it was based on victim

impact information. Booth, 96 L.Ed.2d. at 448.

If Booth announced a merely procedural rule having only "some impact" on the truth finding process in capital litigation, denying its benefit to persons based on the date their convictions became final would be constitutionally acceptable and less morally troublesome. See Allen v. Hardy, 92 L.Ed.2d at 205. Because Booth has a "fundamental impact" on the integrity of capital sentencing decisions, however, retroactive application is appropriate. Id.

IV. THE NEVADA COURT'S DECISION DID NOT REST ON AN ADEQUATE OR INDEPENDENT STATE GROUND.

In opposing review by certiorari, Respondent will undoubtedly argue that the Nevada Supreme Court's decision rested on an "adequate and independent state ground" and that, therefore, this Court lacks jurisdiction to review that decision. See Michigan v. Long, 463 U.S. 1032 (1983). That argument should be rejected.

In its written decision, the Nevada Supreme Court addressed Farmer's claim under Booth v. Maryland and refused to apply it to Farmer "absent direction from the high court" that Booth applies retroactively. On the face of the opinion, the state court declined to apply the constitutional doctrine of Booth and in effect held it non-retroactive to convictions final before Booth was decided. Order Dismissing Appeal at 2-3

(reproduced in appendix). The question of Booth's retroactive application is itself a federal question; and, in declining to apply Booth, the only precedent relied on by the Nevada Supreme Court was a federal one. Id. at 3, citing Solem v. Stumes, supra. The decision of that court turned on a question of federal law, and this Court has jurisdiction to review it.

Admittedly, however, the Nevada Supreme Court's written decision does suggest that the court might have also believed that Farmer's claim under Booth was barred by a state "procedural default." Order Dismissing Appeal at 2 (reproduced in appendix). That possible default apparently consists of the fact that Farmer did not raise the Booth issue at his original penalty hearing but raised it for the first time on appeal from the denial of his state habeas petition. Id.

Despite the arguable availability of a state ground for its decision, the Nevada Supreme Court proceeded to address the Booth issue. One possible explanation is that the court might have overlooked the arguable default if it had agreed with Farmer on the merits of the Booth issue. The Nevada Supreme Court has discretion to allow an issue to be raised for the first time on appeal. McCullogh v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983). And, Nevada courts generally have discretion to relieve a petitioner in collateral proceedings of a procedural default so that he or she can raise an otherwise barred claim. See, e.g., Warden v. Lischko, 90 Nev. 221, 222-223, 523 P.2d 6, 7 (1974),

One of the considerations influencing a Nevada court to allow a petitioner to raise an otherwise procedurally defaulted claim is whether the claim is constitutional in nature. McCullogh, 90 Nev. at 222-223, 523 P.2d at 7; Rogers v. Warden, 86 Nev. 359, 362, 468 P.2d 993, 994 (1970). It is possible, therefore, that the Nevada Supreme Court's holding on the federal claim under Booth influenced its view of the state question of procedural default. Had the court resolved the federal issue regarding Booth's retroactivity in Farmer's favor, it might have exercised its discretion to consider the claim notwithstanding the arguable default. Under this view, the procedural default issue would be intertwined with the question of Booth's retroactivity.

In any event, this Court need not resolve the troublesome issue whether the decision below rested on a state or federal ground. The Nevada Supreme Court discussed both the state issue of procedural default and the federal issue of Booth's retroactivity. In this instance, the Court's jurisdiction is presumed:

> The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. Moreover, we will not assume that a state-court decision rests on adequate and independent state grounds when the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of

any possible state law ground is not clear from the face of the opinion.

Caldwell v. Mississippi, 472 U.S. 320, 327 (1985) (authorities omitted). This Court has jurisdiction to review the Nevada Supreme Court's decision.

CONCLUSION

For the above reasons, petitioner Farmer asks that the petition for a writ of certiorari be granted and this matter set for briefing on the merits.

RESPECTFULLY SUBMITTED,

TERRI STEIK ROESER
Nevada State Public Defender

By: _____
JEFFREY M. EVANS*
Appellate Deputy Public Defender
308 N. Curry, Room 200
Carson City, Nevada 89710
Phone: (702) 885-4880

*Counsel of Record

ORIGINAL

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No. 88-5343

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ROBERT J. FARMER, Petitioner,

v.

GEORGE SUMNER, DIRECTOR OF THE NEVADA DEPARTMENT OF PRISONS,

Respondent.

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIAN McKAY
Nevada Attorney General

BRIAN RANDALL HUTCHINS
Chief Deputy Attorney General
Criminal Justice Division

DAVID F. SARNOWSKI*
Supervising Deputy Attorney General
Criminal Justice Division
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710
Phone: (702) 687-4170

ATTORNEYS FOR RESPONDENT

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Court should decline discretionary review of the capital sentencing issue presented by the certiorari petition of ROBERT JEFFREY FARMER where the petitioner failed timely to preserve the issue at trial, to raise the issue on direct appeal, or to raise the issue during a state trial court level collateral attack proceeding.

2. Whether the Court should decline discretionary review of the capital sentencing issue presented by the certiorari petition where the alleged error was harmless because: (1) the challenged victim impact evidence and argument were not as extensive qualitatively or quantitatively, as the evidence adduced in Booth v. Maryland, ___ U.S. ___, 107 S.Ct. 2529 (1987), (2) no mitigating circumstances were found, thus eliminating the possibility that mitigating circumstances could outweigh the two aggravating circumstances found, and (3) sentencing occurred before a three judge panel rather than a jury.

3. Whether, given the lack of development of the law in both state and federal courts since Booth, the Court should decline discretionary review to decide whether Booth applies to cases pending on collateral review on the date Booth was decided, and because this case does not meet any of the criteria specified in Rule 17 of the Supreme Court Rules.

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OPINIONS AND JUDGMENTS DELIVERED BELOW

The petitioner, ROBERT JEFFREY FARMER [hereinafter FARMER] purports to present one issue to this Court for certiorari review -- that is, whether this Court's decision in Booth v. Maryland, ___ U.S. ___, 107 S.Ct. 2529 (1987), barring the use of victim impact statements (VISs) in capital sentencings, applies retroactively to cases pending on collateral review on the date Booth was decided. See Farmer v. Sumner, Case No. 88-5343, Petition for a Writ of Certiorari to the Supreme Court. To the extent that this question belatedly was presented to the Nevada Supreme Court, FARMER was denied judicial relief in an unpublished Order Dismissing Appeal, issued March 31, 1988. The Nevada Supreme Court denied FARMER'S petition for rehearing on June 23, 1988. The Order Dismissing Appeal and Order Denying Rehearing are not officially reported. Accordingly, they are reproduced in Appendices A and B to this brief.

The Nevada Supreme Court's denial of appellate relief followed denial of a post-conviction petition for writ of habeas corpus by the First Judicial District Court of the State of Nevada in and for Carson City, on March 20, 1987. The district court's order denying habeas corpus relief is not officially reported. Accordingly, it is reproduced in Appendix C to this brief.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked by the subject certiorari petition pursuant to section 1257(3) of Title 28 to the United States Code. 28 U.S.C. 1257(3) (1982).

. . .

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. Eighth Amendment to the United States Constitution:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Rule 17 of the United States Supreme Court Rules:

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

FARMER's conviction for first degree murder and the sentence of death imposed thereon were the result of a three day crime spree which stretched from one end of Nevada to the other. On January 16, 1982, FARMER kidnapped and robbed Linda Cobb and her eight year old son at gun point near Reno, Washoe County, in northwestern Nevada. On January 17, 1982, he stabbed Thomas Kane to death in another part of Washoe County and stole his

car. FARMER then traveled south toward Las Vegas. En route, he met Archie Blackcrow and Melanie Marks in Lathrop Wells. They traveled toward Las Vegas but FARMER abandoned Kane's car along the highway. The trio hitchhiked to Las Vegas, Clark County, in southern Nevada. There, they were befriended by taxicab driver Greg Gelunas.

Gelunas allowed the three to sleep over night in his back yard. FARMER and Blackcrow hatched a plot to rob Gelunas. When Blackcrow grew unwilling or unable to carry out a planned debilitating assault against Gelunas with a rock, FARMER entered Gelunas' home, accosted him and stabbed him to death with a knife. The trio immediately left the Las Vegas area in Gelunas' car and parted company in Arizona. FARMER was later apprehended in Florida and returned to Nevada, initially to Washoe County.

First, FARMER was tried for the Cobb incident in the Second Judicial District Court of the State of Nevada in and for the County of Washoe. The jury returned guilty verdicts for one count of robbery with the use of a deadly weapon and one count of kidnapping in the second degree with the use of a deadly weapon. The court imposed nine year prison sentences for each of the primary offenses, plus consecutive nine year sentences for the weapon enhancements on each count. See Nev. Rev. Stat. § 200.310(2), 200.330, 200.380 and 193.165.

Next, FARMER was tried in Washoe County for the Kane murder. The jury returned verdicts of guilty on counts of first degree murder and possession of a stolen motor vehicle. The jury imposed a sentence of life without the possibility of parole for the murder and the court imposed a consecutive ten

year sentence for the theft offense. See Nev. Rev. Stat. § 200.010, 200.030(4)(g), and 205.273.

With respect to the Gelunas incident, on March 26, 1984, FARMER entered a plea of guilty to the crimes of first degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark. He proceeded to sentencing on the murder before a panel consisting of the trial judge who accepted his plea and two other appointed district court judges. Without objection from the defense, the prosecutor adduced testimonial evidence from Mrs. Cobb regarding the effects the aforementioned kidnap had on her son. Also without objection from the defense, the prosecutor related to the three judge panel that Greg Gelunas' mother had been subject to "extreme emotional impact" as a result of FARMER'S brutal murder of her son. In that regard, FARMER'S petition accurately relates the content of the "victim impact evidence" which is the subject of the petition.

At sentencing, the State introduced the pre-sentence investigation reports and judgments of conviction for the two sets of Washoe County crimes previously adjudicated. The State also introduced a Florida pre-sentence investigation report and judgment and sentence on FARMER dated July 26, 1976, from the Circuit Court of Putnam County. There, he had been convicted of grand larceny and larceny of a motor vehicle and sentenced to two five year terms of imprisonment. The State also introduced a statement of facts and a judgment of conviction FARMER sustained in Evangeline Parish, Louisiana, in February 1976.

There, he was convicted of six counts of simple burglary and one count of theft, and sentenced to an eighteen month term of imprisonment. None of these reports were the subject of an objection or motion to strike.

Murray Posin, FARMER's defense counsel, adduced mitigating evidence from FARMER's Washoe County attorneys and from his mother. Evidence regarding previous psychiatric problems was also presented. FARMER also testified, and stated that ". . . killing is not wrong. It's a way of life. Death is something that's going to happen, regardless." Record, Vol. II, p. 549.

The three judge panel found as separate aggravating circumstances that the murder was committed during the commission of a robbery and during the commission of a burglary. The three judge panel did not find as an aggravating circumstance that the murder was committed by a person who was previously convicted of another murder. The state had not dropped the allegation that FARMER'S conviction for the Kane murder was an aggravating circumstance. Rather, the prosecutor stated that he did not think the prior Washoe County murder "qualified" legally as an aggravating circumstance. He invited the panel to make a separate determination of the issue on its own.[1] See Record, Vol. II at 518.

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[1]Following FARMER's conviction, the Nevada Supreme Court held that even properly qualified evidence of prior uncharged homicides is admissible at a capital sentencing proceeding because it is highly relevant to meaningful consideration of a defendant's death worthiness. Gallego v. State, 101 Nev. 782, 792, 711 P.2d 856, 863-64 (1985), cert. denied sub nom. Gallego v. Nevada, 479 U.S. 871-72 (1986).

The panel did not report finding any mitigating circumstances. In accordance with applicable Nevada law, the panel found that the existent aggravating circumstances were not outweighed by mitigating circumstances, and sentenced FARMER to death. See, Nev. Rev. Stat. 200.030(4)(a), 200.033(4)(a). (Appendix D). Later, the original trial judge imposed two consecutive fifteen year terms for the robbery count and the weapon enhancement. See, Nev. Rev. Stat. 200.380 and 193.165. Record, Vol. II, pp. 581-582.

FARMER's trial counsel never objected to the questioned victim impact evidence or the prosecutor's comments. In fact, counsel expressly indicated a desire not to "withhold anything" from the sentencing tribunal. Record, Vol. II, pp. 461, 466. On direct appeal, the victim impact issue was not litigated and the Nevada Supreme Court denied relief on several alternative grounds raised. Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985). The issue also was not raised before this Court, which denied certiorari. Farmer v. Nevada, 476 U.S. 1130 (1986). Present counsel, the Nevada State Public Defender, did not raise the Booth issue or Mr. Posin's failure to preserve the issue, in the habeas corpus proceeding before the First Judicial District Court. It was only during the briefing stage of the habeas appeal in the Nevada Supreme Court that present counsel raised the issue for the first time.

Upon FARMER's own admission through present counsel, the Nevada Supreme Court noted that the Booth issue had not been raised prior to the second state appellate proceeding. The Nevada Supreme Court went on to hold that FARMER had failed to

show cause for the procedural default, both on direct appeal and during the district court habeas action. As an aside, the Nevada Supreme Court declined to apply Booth retroactively absent express direction from this Court to do so in this type of case. (Appendix A). Without comment, the Nevada Supreme Court merely denied FARMER's petition for rehearing despite the conflicting contentions by the parties below that this court's decision in Booth is subject to harmless error analysis. (Appendix B).

SUMMARY OF THE ARGUMENT

There are several reasons why this Court should decline to review the decision of the Supreme Court of the State of Nevada. First, FARMER, through counsel, expressly advised the capital sentencing tribunal that FARMER's intent was that he did not want to "withhold anything" from it so that the tribunal could reach an appropriate sentence. No objection to the questioned evidence or argument was made. The issue was not raised on direct appeal nor was it pleaded or litigated during extensive evidentiary proceedings in the district court which considered FARMER's habeas corpus petition.

Secondly, even if it was error to allow evidence or argument of the type under consideration here, the error was harmless beyond a reasonable doubt because: (1) the evidence was qualitatively and quantitatively different than the VISs condemned in Booth, (2) because of the lack of any mitigating circumstances at all in the face of multiple aggravating circumstances, and (3) because the sentencing tribunal consisted of judges rather than lay jurors. The Nevada Supreme Court has

also not had a fair opportunity to address the factual issues here first due to a finding of procedural default.

Thirdly, the decision of the Nevada Supreme Court is not in conflict with the decisions of other state courts of last resort or the federal courts of appeals. The issue and sub-issues within it have not been developed in the state and federal courts. The issue of retroactivity is one which, absent the glaring procedural defaults and harmlessness of error here, may subsequently present an important question of federal constitutional law. The question is one which should not be settled by this Court at this time, without consideration by other state courts and federal courts, and until such time as a conflict cognizable under Supreme Court Rule 17 develops.

ARGUMENT

A. Procedural Default Constitutes an Independent and Adequate State Ground for the Decision Below and Dictates Denial of Certiorari.

An independent and adequate state ground, procedural default, exists to support the decision below. In its Order Dismissing Appeal, the Nevada Supreme Court addressed specifically the subject of FARMER's procedural default, which was proffered as a defense by the Respondent and was admitted by FARMER. The court reaffirmed a prior holding that it will not consider an issue that is raised for the first time on appeal, see Gibbons v. State, 97 Nev. 520, 523, 634 P.2d 1214, 1216 (1981) and reiterated that the procedural default doctrine is applicable to derelictions which occur during post-conviction relief actions, see Junior v. Warden, 91 Nev. 111, 532 P.2d 1037

(1975). In such a circumstance, it has been held that denial of review is appropriate where Booth error is asserted. Cohen v. State, 361 S.E.2d 373, 376 (Ga. 1987), cert. denied sub nom. Cohen v. Georgia, ___ U.S. ___, 108 S.Ct. 1282 (1988).

Relying on Murray v. Carrier, 477 U.S. 478, 487-88 (1986), the Nevada Supreme Court expressly held that FARMER has "failed to show cause for this procedural default." With respect to the Booth evidentiary issue, as well as the related claims of prosecutorial misconduct which referred to the prosecutor's argument regarding Mrs. Gelunas' state of mind, the Nevada Supreme Court concluded that the contentions raised "have been either procedurally barred, or that FARMER has failed to sustain his burden of proof or show prejudice." Farmer v. Director, Nevada Department of Prisons, Slip Op. at 5 (emphasis added). The court did not discuss in its order a burden of proof problem or a prejudice showing with respect to either the Booth issue or the prosecutorial misconduct issue. Rather, these topics were discussed in relation to the issues of a voluntary and knowing guilty plea and the effectiveness of counsel, respectively. Therefore, it must be concluded that the procedural default holding related solely to the Booth issue and the issue of prosecutorial misconduct.

The Respondent asserts here that FARMER has mislead this court by preemptively contending that no independent and adequate state grounds exist to sustain the decision. Instead, he engages in nothing more than rank speculation that the Nevada Supreme Court "might have overlooked the arguable default if it had agreed with FARMER on the merits of the Booth issue."

Petition for Writ of Certiorari, p. 20. The Nevada Supreme Court's Order Dismissing Appeal does more than merely "suggest" that the court "might have also believed" that FARMER'S claim under Booth was barred by procedural default. A reading of the entire decision and the holding of the court, when taken in full context, leads to the inescapable conclusion that the Nevada Supreme Court applied the doctrine of procedural default and refused to grant relief solely on the basis of the default.

In consonance with this Court's holding in Caldwell v. Mississippi, 472 U.S. 320, 327 (1985), the Nevada Supreme Court did not depend on the federal retroactivity issue nor was that issue intertwined with its procedural ruling. The court actually relied on the procedural bar as an independent basis for its disposition of the case. Merely by addressing the retroactivity issue in the alternative, the Nevada Supreme Court did not ignore or dishonor its own procedural rule so as to allow a belated consideration of the retroactivity issue solely on its merits. This course of action is in keeping with the majority view of the respective federal circuit courts that, if a state court's adjudication on the merits is made in the alternative and does not constitute the principal basis for the state court's denial of relief, the federal courts will decline to resolve the issue on the merits. Bagby v. Sowders, 853 F.2d 1340 (6th Cir. 1988); Hardin v. Black, 845 F.2d 953 (11th Cir. 1988); Harris v. Reed, 822 F.2d 684 (7th Cir. 1987), cert. granted, ___ U.S. ___, 108 S.Ct. 1107 (1988); Davis v. Allsbrooks, 778 F.2d 168, 175 (4th Cir. 1985); McCowen v. Callahan, 726 F.2d 1, 6 (1st Cir. 1984), cert. denied, 469 U.S.

839 (1984); Phillips v. Smith, 717 F.2d 44, 48 (2nd Cir. 1984), cert. denied, 465 U.S. 1027 (1984); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435 (3rd Cir. 1982). Contra, Bruni v. Lewis, 847 F.2d 561 (9th Cir. 1988).

B. The Application of Harmless Error Analysis Should Preclude Litigation of the Issue Presented for Certiorari Review.

In the State of Nevada, the supreme court may render a judgment "without regard to technical error or defect which does not affect the substantial rights of the parties." Nev. Rev. Stat. § 177.255 (1985) (Appendix D). The lower court exercised its discretion but did not relieve FARMER from multiple procedural defaults. As a matter of federal constitutional law, "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Chapman v. California, 386 U.S. 18, 22 (1967). In such a case, a court "must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. at 24. The Nevada Supreme Court declined even to reach the Respondent's harmless error contention because the court disposed of the case on at least one independent and adequate state ground, as well as noting that Booth would not be applied retroactively in this case context absent the express authority of this Court to the contrary. Nevertheless, such an analysis, if actually made, would preclude relief.

In this case, FARMER was represented by counsel at all critical stages of the proceedings prior to trial, at trial

before the three judge panel and on direct appeal. At the conclusion of a direct appeal proceeding, "there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." Rose v. Clark, 478 U.S. 570, 576-77 (1986). The harmless error principle has been applied to many constitutional errors as noted by this Court in Rose. See, e.g., Delaware v. Van Arsdall, 475 U.S. 673 (1986) (failure to permit cross-examination concerning witness bias); Rushen v. Spain, 464 U.S. 114 (1983) (per curiam) (denial of right to be present at trial); United States v. Hasting, 461 U.S. 499 (1983) (improper comment on defendant's failure to testify); Moore v. Illinois, 434 U.S. 220 (1977) (admission of witness identification obtained in violation of right to counsel); Milton v. Wainwright, 407 U.S. 371 (1972) (admission of confession obtained in violation of right to counsel); and Chambers v. Maroney, 399 U.S. 42 (1970) (admission of evidence obtained in violation of the fourth amendment).

If this Court were to grant certiorari and decide the retroactivity issue in FARMER's favor, relief would not be forthcoming automatically. Necessarily, a review of the entire sentencing proceeding would have to occur in order to make a determination as to whether or not a finding of harmless error is appropriate. A resolution of the retroactivity issue presented in FARMER's petition would not necessarily yield the result he seeks, a vacated sentence, due to the need for an independent harmless error determination by the Nevada Supreme Court. This analysis would have to address (1) whether, as a matter of state or federal constitutional law, harmless error

analysis is appropriate in the context of a capital sentencing proceeding in Nevada and (2) assuming it is applicable, whether under the facts of this case, harmless error is apparent from a review of the record. The ultimate resolution of those issues by the Nevada Supreme Court would presumably invite additional review by this Court regarding the applicability of harmless error doctrine at all and harmless error under the particular facts of this case, matters which were not addressed by the lower court.

Here, the limited evidence presented during the brief, equivocal testimony of Mrs. Cobb hardly rises to the level of that considered constitutionally impermissible in Booth. Additionally, the prosecutor's reference to the emotional impact of Greg Gelunas' murder on Gelunas' mother is neither qualitatively nor quantitatively similar to the statutorily mandated VISs in Booth. The passing reference here is not even a close equivalent of the detailed reports of multiple family members in Booth who were allowed to apprise the sentencing jury of their own views regarding an appropriate sentence and who described their grief and the outpouring of community support following their parents' demise.

In several cases considered on direct appeal recently, the California Supreme Court has considered the application of harmless error analysis to Booth issues and has concluded that a prosecutor's remarks or evidence of the kind adduced in FARMER's case had no effect on the sentencing verdict. People v. Siripongs, 754 P.2d 1306, 1324 (Cal. 1988); People v. Hovey, 749 P.2d 776, 795 (Cal. 1988); People v. Miranda, 744 P.2d 1127,

1162 (Cal. 1987); People v. Ghent, 739 P.2d 1250, 1271 (Cal. 1987).

Likewise, the North Carolina Supreme Court has recently held that, although the reference to the victim's family's rights was not error, even if such reference had been erroneous, it was nevertheless de minimis. Moreover, the trial court did not abuse its discretion in failing to recognize and correct any error sua sponte. State v. Brown, 358 S.E.2d 1, 17-18 (N.Car. 1987), cert. denied sub nom. Brown v. North Carolina, ___ U.S. ___, 108 S.Ct. 467 (1987). Accord, Byrne v. Butler, 845 F.2d 501 (5th Cir. 1988) (under the facts of the case, the state prosecutor's comments about victim impact did not rise to the level of a federal constitutional violation).

As an additional factor in the harmless error analysis, this Court must also consider the findings of the sentencing tribunal. The three judge panel found the existence of two aggravating circumstances and no mitigating circumstances. Under Nevada law, the state is required to prove beyond a reasonable doubt the existence of at least one statutory aggravating circumstance and the defendant is allowed to present evidence of any mitigating circumstance. The sentencing tribunal must determine whether mitigating factors outweigh aggravating factors and the Nevada Supreme Court has concluded that the Nevada statute passes constitutional muster. Ybarra v. State, 100 Nev. 167, 173-76, 679 P.2d 797, 801-03 (1984), cert. denied sub nom. Ybarra v. Nevada, 470 U.S. 1009 (1985). The federal courts which have considered Nevada's sentencing statute have concluded that, even in the presence of one arguably

invalid aggravating circumstance, where one or more valid aggravating circumstances exist, a sentence of death is permissible in a case where no mitigation is found. Neuschafer v. Whitley, 816 F.2d 1390, 1393 (9th Cir. 1987), citing Zant v. Stevens, 462 U.S. 862 (1983); Deutscher v. Whitley, 682 F.Supp 1098 (D. Nev. 1988).

Finally, in rebuttal to FARMER's express position, the Respondent submits that a third and independently adequate basis on which to consider any error harmless is the nature of the sentencing body. Here, the three judge panel considered the case and made express findings regarding the existence of aggravating circumstances. Interestingly, they apparently erred on the side of caution by declining to find the existence of a third aggravating circumstance (FARMER's prior murder conviction which was on direct appeal), although it was allowable to do so under Nevada law. See Nev. Rev. Stat. 200.033(2). (Appendix D). The sentencing body obviously was judicious in considering FARMER's case although it was incorrect in not finding the third aggravating circumstance where overwhelming proof of the prior murder was presented and there was an absence of proof that FARMER had not been convicted of murder. This is because the Nevada Supreme Court has held that even properly qualified evidence of prior uncharged homicides is admissible because it is highly relevant to meaningful consideration of a defendant's death worthiness. Gallego v. State, 101 Nev. 782, 792, 711 P.2d 856, 863-64 (1985), cert. denied sub nom. Gallego v. Nevada, 479 U.S. 871-72 (1986). The Nevada Supreme Court has also ruled that evidence of a defendant's prior felony convictions

involving violence is relevant to an assessment of the defendant's character. Rogers v. State, 101 Nev. 457, 466, 705 P.2d 664, 670 (1985), cert. denied, 476 U.S. 1130 (1986).

Perhaps most apposite to the case sub judice is the holding of the Ohio Supreme Court in State v. Post, 413 N.E.2d 754 (Ohio 1987), cert. denied sub nom. Post v. Ohio, ___ U.S. ___, 108 S.Ct. 1061 (1988). There, the Ohio Supreme Court addressed circumstances similar to those in this case where alleged victim impact evidence had been presented to a three judge panel rather than a jury. The Post court applied a controlling presumption that in a bench trial in a criminal case the court considers only relevant, material and competent evidence in arriving at its judgment. It held that, absent an indication that the three judge panel was influenced by or considered the victim impact evidence in arriving at its sentencing decision, the admission of the victim impact statement as well as permitting the victim's son to address the court at the mitigation hearing did not constitute "prejudicial error." Id. at 759. Cf. Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987) (where a capital sentencing judge had access to victim impact statement in pre-sentence investigation report but adopted jury's recommendation relying solely on the weight of the statutorily authorized aggravating circumstances, Booth was held inapplicable); State v. Bell, 360 S.E.2d 706 (S.Car. 1987), cert. denied sub nom. Bell v. South Carolina, ___ U.S. ___, 108 S.Ct. 734 (1988) (holding differentiated circumstance of capital sentencing judge having access to VIS from an instance where jury has access); State v. Keith, 754 P.2d 474, 487-88 (Mont. 1988) (no Booth

violation because a judge imposes sentence).

C. The Court Should Decline to Review This Matter by Way of a Writ of Certiorari Where the Retroactivity Issue Presented is Not Cognizable Under Supreme Court Rule 17.

The Rules of Practice of the Supreme Court of the United States provide that the jurisdiction of the Court upon a writ of certiorari will be generally exercised with respect to the decisions of the federal courts of appeal which may be in conflict with one another, where the decision of a federal court of appeals is in conflict with the decision of a state court of last resort, or where state court decisions from different states are in conflict. Additionally, the rule provides for the exercise of the Court's jurisdiction when a state court or federal court of appeals has decided an important question of federal law which has not been but should be settled by this Court or has decided a federal question in a way in conflict with applicable decisions of this Court. The issue presented in FARMER's petition does not satisfy any of these criteria.

FARMER asserts that the retroactivity question should be decided because the Nevada Supreme Court's decision conflicts with this Court's decision in Booth. This is not the case and it is disingenious to argue that it is. Simply put, the Nevada Supreme Court did not dispose of the case on whether or not the admission of the subject evidence and the prosecutor's argument were violative of Booth. The Nevada Supreme Court did not do so because of FARMER's multiple procedural defaults. Moreover, the question actually presented here regarding the retroactivity of Booth was not decided contrary to any decision of this Court

because, as FARMER readily acknowledges in presenting the very issue to the Court, this Court has not decided it. To be sure, this Court's jurisdiction to review the Nevada Supreme Court's decision should not be based on a nonexistent conflict with a nonexistent holding of a nonexistent case.

Since this Court decided Booth in June, 1987, several state courts and a couple of federal circuit courts have had occasion to address Booth in one context or another. None has issued a holding regarding Booth's retroactivity during collateral attack. No post-Booth decision is inconsistent with the holding of the Nevada Supreme Court in FARMER's case, insofar as the retroactivity issue is concerned. Several of those cases, which have been cited in the Respondent's previous arguments, clearly did not reach the issue that FARMER presents to this Court because they were decided on procedural default grounds or harmless error grounds, both of which are largely supportive of the Respondent's position in this case. Grossman v. State, 525 So.2d 833 (Fla. 1988).

Only one other court has addressed the issue at all and it did so in a way largely unnecessary to the disposition of the case. In People v. Simms, 520 N.E.2d 308 (Ill. 1988), the Illinois Supreme Court considered the direct appeal of a capital defendant who claimed Booth error. Unlike the Nevada Supreme Court, which concluded in this case that Booth did not announce a new rule, the Illinois court apparently concluded that Booth did announce a new rule. The Illinois Supreme Court applied Booth retroactively to cases currently pending on direct appeal, an act totally in accordance with this Court's holding in

Griffith v. Kentucky, 479 U.S. 314 (1987). The Simms court went on to discuss what it felt to be the theoretical inappropriateness of the harmless error doctrine in capital sentencing. However, the court did not ultimately dispose of the case based on collateral retroactivity or via a ruling to the effect that harmless error analysis can never be applied in capital sentencing proceedings. Rather, it concluded that the state had not met its burden of proving beyond a reasonable doubt that the trial judge's weighing of victim impact evidence did not affect his decision to impose the death penalty.

Additionally, the Illinois court's dicta in Simms is troublesome because of an apparent contrary position announced in People v. Crews, 522 N.E.2d 1167, 1176-78 (Ill. 1988). If anything, the holding of the Illinois court supports the Respondent's position because it has also held that Booth error is not "plain error" to be considered initially in a post-conviction attack. People v. Free, 522 N.E.2d 1184, 1186-89 (Ill. 1988).

Similarly, in Harris v. State, 539 A.2d 637 (Md. 1988), the Maryland Supreme Court reversed the death sentence of a petitioner whose case was pending direct appeal, specifically as to sentencing, for the third time. The Maryland court determined that under its particular statutory scheme, the state's assertion of harmless error was probably not appropriate. However, the court concluded that, even if the doctrine applied, under the particular circumstances of the case, the VISs similar to those condemned in Booth had been introduced in Harris' case, and might have had an improperly prejudicial affect on the sentencing process. The Maryland court's holding is distinguishable not only because it was a direct appeal case, but also because the court was able to grant relief on grounds peculiar to the Maryland sentencing statute in question and in a way that necessarily foreclosed consideration of the retroactivity issue presented here.

Finally, in Patterson v. State, 513 S.2d 1263 (Fla. 1987), the Florida Supreme Court reversed a death sentence because of the sentencing judge's failure personally to articulate specific aggravating and mitigating circumstances, an act which he apparently delegated to the state's attorney. In dicta, the court opined that a Booth error occurred because of admission of the testimony of the victim's niece, who had responsibility for the victim's children after the victim's death. Clearly, this case is also distinguishable because (1) it was decided on direct appeal, (2) the court's dicta was largely gratuitous and unnecessary to the disposition of the case, and (3) the issue was apparently addressed with an eye toward supervising the Florida trial courts to prevent future error in the same or similar cases. The Patterson court did not reach any determination as to retroactivity in a collateral attack setting nor, apparently, did the state even attempt to present a harmless error analysis.

No conflicts regarding Booth's retroactivity exist at the present time. While the issue of retroactivity must be decided some time, the particular facts of this case do not lend themselves to an appropriate certiorari disposition in this Court. Although this Court decided Booth more than one year

ago, it is quite obvious that the specific retroactivity issue presented in this case has largely remained unaddressed by both state and federal appellate courts. Undoubtedly, the issue will percolate in those courts. The decisions of those courts will be important to the development of the law and ultimate disposition of the issue before this Court. In a proper case, such as where the issue had been preserved but relief had not been afforded prior to the cessation of pre-Booth direct appeal proceedings, this Court may well have occasion to resolve the issue.

Additionally, FARMER's own analysis of the uncertainty of the state of retroactivity law as defined by this Court goes a long way in counseling against rather than for the exercise of certiorari jurisdiction presently. Sub-issues included within the question he presents obviously include a determination as to whether Booth announced a new principle or merely applied existing precedent to the facts brought before the bar of this Court. The Respondent's previous discussion regarding a lack of case law, both state and federal, on that particular topic as well as on the even more complex topic of the appropriate retroactivity test to be applied generally and more specifically to this issue, further complicate this case to the point where the exercise of this Court's certiorari jurisdiction is inappropriate at this time.

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CONCLUSION

Respondent respectfully requests that this Honorable Court deny the certiorari petition of ROBERT JEFFREY FARMER.

DATED: October 6th, 1988.

Respectfully submitted,

BRIAN McKAY
Attorney General of the State of Nevada

Brian Randall Hutchins
Chief Criminal Deputy Attorney General
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710

By David F. Sarnowski
David F. Sarnowski*
Supervising Deputy Attorney General
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710
Phone: (702) 687-4170

*Counsel of Record

APPENDICES

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT J. FARMER,

Appellant,

v.

DIRECTOR, NEVADA DEPARTMENT OF PRISONS, GEORGE SUMNER,

Respondent.

No. 18052

FILED

MAR 31 1988

JUDITH POUNTAIN
CLERK, SUPREME COURT

ORDER DISMISSING APPEAL

This is an appeal from the district court's order denying appellant's petition for a writ of habeas corpus.

Robert Farmer pled guilty to a murder committed on January 18, 1984. He was sentenced to death by a three-judge panel, and we affirmed the sentence on direct appeal. See Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985). In September 1986, Farmer filed his petition for a writ of habeas corpus. An evidentiary hearing was held by the lower court on February 5, 1987. Following the hearing, the lower court ordered the petition dismissed.

Farmer contends that evidence was admitted at his penalty hearing which violated the Eighth Amendment of the United States Constitution, requiring that the death sentence be set aside. In Booth v. Maryland, ___ U.S. ___, 107 S. Ct. 2529 (1987), the Supreme Court held that the introduction of a victim impact statement at the sentencing phase of a capital murder trial did violate the guarantees of the Eighth Amendment. Farmer alleges several violations of the Eighth Amendment as announced in Booth: (1) representations by the prosecutor that he observed and spoke with Mrs. Celunas about the devastating impact of her son's death, (2) the introduction of a presentence report from Washoe County concerning the impact of an unrelated homicide and the representations of the son of the victim of the

unrelated homicide, and (3) testimony of Mrs. Cobb, a victim of an unrelated kidnapping, relating to the impact on her son and herself.

Respondent argues, and Farmer admits, that this issue was not raised prior to this appeal. It was not raised at the sentencing hearing; it was not raised on direct appeal; and it was not raised at the habeas corpus proceedings below. Generally, this court will not consider an issue that is raised for the first time on appeal. Gibbons v. State, 97 Nev. 520, 523, 634 P.2d 1214, 1216 (1981). Procedural default has similarly been applied to post-conviction relief actions. See Junior v. Warden, 91 Nev. 111, 532 P.2d 1037 (1975); Johnson v. Warden, 89 Nev. 476, 477, 515 P.2d 63, 64 (1973). We note that substantial case law existed at the time of the penalty hearing which supported the court's decision in Booth v. Maryland, ___ U.S. ___, 107 S. Ct. 2529. See Zant v. Stephens, 462 U.S. 862, 879, 885 (1983); Enmund v. Florida, 458 U.S. 782, 798, 801 (1982); Booth v. Maryland, 507 A.2d 1098, 1124 (Md. 1986). Accordingly, we find that Farmer has failed to show cause for this procedural default. Murray v. Carrier, 477 U.S. 478, ___, 106 S. Ct. 2639, 2645-2646 (1986).

Furthermore, we note that Farmer's direct appeal was final on August 27, 1985. Booth v. Maryland, ___ U.S. ___, 107 S. Ct. 2529, was not decided until June 15, 1987. Farmer has failed to direct this court's attention to any cases which suggest that Booth should be applied retroactively to decisions which were final prior to the date of the Court's ruling. The United States Supreme Court has not defined the limits of retroactive application of the Booth decision, and absent the high court's direction we will not extend the application of that decision to the degree which reversal this case would

require. See Solem v. Stumes, 465 U.S. 638, 643, 650-651 (1983).

Farmer alleges that there were several instances of prosecutorial misconduct at the penalty hearing. Respondent admits that certain statements made by the prosecutor were improper. However, a claim of prosecutorial misconduct could have and should have been presented on direct appeal. Accordingly, Farmer is procedurally barred from bringing this claim. Kimmel v. Warden, 101 Nev. 6, 7-8, 692 P.2d 1286, 1287-1288 (1985); Junior v. Warden, 91 Nev. 111, 532 P.2d 1037 (1975).

Farmer contends that the lower court abused its discretion in concluding that he knowingly and intelligently entered his pleas of guilty. On the morning of his trial, March 26, 1984, Farmer withdrew his original plea and pled guilty to murder with the use of a deadly weapon and robbery with the use of a deadly weapon. We have stated that the following minimal requirements must be shown affirmatively in cases where a guilty plea has been accepted: (1) an understanding waiver of constitutional rights and privileges, (2) absence of coercion by threat or promise of leniency, (3) understanding of consequences of the plea, the range of punishments, and (4) an understanding of the charge and the elements of the offense. Hanley v. State, 97 Nev. 130, 133, 624 P.2d 1387, 1389 (1981). The issues in the instant case relate to the latter two requirements.

During the entry of the guilty pleas, the court questioned Farmer as to whether the pleas were voluntarily and knowingly made. The court specifically asked Farmer whether the pleas were made freely and voluntarily and without any fear, threat, or promises, whether he was aware of the maximum penalties possible, death for murder and two consecutive fifteen

year terms for robbery with the use of a deadly weapon, and whether he was aware of his constitutional rights which he was waiving by pleading guilty. Farmer was then asked whether he had discussed both counts with his attorney and whether his attorney had explained the elements of the crimes, the State's burden of proof, and the maximum sentences. Farmer responded affirmatively to all questions. Farmer then stated that there was a plan between himself and two others to rob the victim and that during the robbery he stabbed and killed the victim and then proceeded to take the property from the victim's home. At the penalty hearing, eyewitness testimony was presented in support of Farmer's admissions. Based on our review of the record under the totality of circumstances test as announced in Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986), we conclude that the lower court did not abuse its discretion in concluding that Farmer knowingly and intelligently entered his pleas of guilty.

Farmer contends that testimony presented at the penalty hearing by an eyewitness was insufficient to support the finding of aggravating circumstances. Farmer argues that Melanie Marks, the eyewitness, was an accomplice to the crime charged and her testimony was unsupported. Respondent does not admit that Marks was, in fact, an accomplice, and we find it unnecessary to resolve that issue.

When Farmer pled guilty, he admitted that he stabbed and killed the victim, and that he remembered taking things from the victim's home following the murder. Additionally, he made self-incriminating statements at the penalty hearing, including a statement that he left the victim's home in a motor vehicle which apparently was at the victim's home and belonged to the victim's mother.

Given this additional evidence, we find that the testimony of Melanie Marks was sufficiently corroborated so as to support the panel's finding of the aggravating circumstances.

Lastly, Farmer contends that he received ineffective assistance of counsel. Farmer attempts to support this claim based largely upon the alleged error which we have resolved above. However, Farmer also alleges that his counsel ineffectively investigated and presented mitigating evidence. He argues that his counsel neglected to present relevant medical and psychiatric evidence at the penalty hearing. Farmer maintains in his brief that "the exact nature of his medical, physical and psychiatric makeup are [sic] undocumented and unexplained." Given the fact that Farmer has still failed to obtain this evidence and include it in the record, it must be concluded that there has been no showing of prejudice. Without such a showing, Farmer has not met his burden of proof. Strickland v. Washington, 466 U.S. 668 (1984).

In summary, we find that the contentions raised by Farmer have been either procedurally barred, or that Farmer has failed to sustain his burden of proof or show prejudice. Accordingly, we hereby

ORDER this appeal dismissed.

Gunderson, C.J.

Steffen, J.

Young, J.

Springer, J.

Mowbray, J.

cc: Hon. Michael E. Fondi, District Judge
Hon. Brian McKay, Attorney General
Brian Hutchins, Chief Deputy Attorney General
David Sarnowski, Deputy Attorney General
Terri Steik Roeser, State Public Defender
Michael K. Powell, Chief Appellate Deputy
Alan Glover, Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT J. FARMER,
Appellant,
vs.
DIRECTOR, NEVADA DEPARTMENT OF PRISONS, GEORGE SUMNER,
Respondent.

No. 18052

FILED
JUN 23 1988
CLERK OF SUPREME COURT

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Gunderson, C. J.

Steffen, J.

Young, J.

Spitzer, J.

Mowbray, J.

cc: Hon. Michael E. Fondi, District Judge
Hon. Brian McKay, Attorney General
Terri Steik Roeser, State Public Defender
Alan Glover, Clerk

Case No. 86-01509H

Dept. No. II

FILED

'87 MAR 20 P2:17

TED P. THORNTON

BY _____ DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

ROBERT J. FARMER,
Petitioner,

vs.

GEORGE W. SUMNER, Director of the Nevada Department of Prisons,
Respondent.

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

This matter came before the court on February 5, 1986, for a hearing on a petition for writ of habeas corpus filed by petitioner on September 19, 1986. Petitioner was present in court with his counsel of record, Robert A. Bork, State Public Defender, and respondent was represented by Brian Randall Hutchins, Chief Deputy Attorney General. The court heard evidence on the matter, reviewed all of the documents and pleadings on file herein, and now deems itself fully advised in the facts and the law. Accordingly, this court makes the following findings of fact and conclusions of law.

Petitioner Farmer, hereinafter FARMER, pled guilty to Murder and Robbery with the Use of a Deadly Weapon, on March 26, 1984, in the Eighth Judicial District Court in Clark County. He was subsequently adjudicated guilty and, after a penalty hearing

before a three-judge panel, was sentenced to death for the murder with use of a deadly weapon and two consecutive terms of fifteen years on the charge of robbery with the use of a deadly weapon. FARMER had originally pled not guilty to the five crimes with which he was originally charged but the remaining counts were dismissed at sentencing. The statement of the case set forth by the respondent in its answer to the petition for writ of habeas corpus is correct. Following the return of the penalty of death, FARMER appealed to the Nevada Supreme Court and that court affirmed the convictions and sentences in August of 1985 and the United States Supreme Court dismissed the petition for writ of certiorari. Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985), cert. denied sub nom. Farmer v. Nevada, ____ U.S. ____, 106 S.Ct. 1999 (1986). The facts concerning the case are accurately set forth in the opinion of the Nevada Supreme Court.

FARMER's habeas corpus petition alleged that he was denied effective assistance of counsel and that his plea was involuntary. With regard to the voluntariness claim, petitioner stated only that he did not understand the elements of the crimes involved and that they were not fully explained by his counsel. He also stated that he had been convinced by his counsel that he would have a better chance of avoiding the death penalty if he pled guilty and faced the three-judge panel. Finally, FARMER claimed that it was not explained to him in detail "about felony murder and the many after-effects involved."

With regard to the claim related to ineffective counsel, petitioner claimed that his trial counsel failed to inform him

of possible results of a guilty plea, did not defend him as well as he could have, and that this was counsel's first capital punishment case. He also claimed that counsel "neglected several area's [sic] that were direct lies" of a prosecution witness appearing during the penalty phase.

This court has made all efforts to construe liberally the allegations set forth in the habeas corpus petition. In addition, counsel for FARMER filed a supplemental petition for writ of habeas corpus claiming that counsel was ineffective at the penalty hearing for not presenting sufficient mitigating evidence -- specifically, expert psychiatric testimony regarding FARMER's psychiatric history. The supplemental petition also raised the claim of prosecutorial misconduct which was alleged to have occurred when the prosecutor presented evidence on aggravating circumstances not applicable to the case and argued about facts which were not supported by evidence produced by the State. These claims were not further specified and are conclusory.

A. Sufficiency Of Guilty Plea And Waiver Of Jury.

The first claim which should be discussed is that the guilty plea was not voluntarily entered. Even though this court held an evidentiary hearing on the matter, it is clear that the record thoroughly refutes the claims of petitioner. Of course, in order for a guilty plea to be valid, the entire record must show an understanding waiver of constitutional rights and privileges, an absence of coercion by threat or promise of leniency, an understanding of the consequences of the plea and the range of punishment, and an understanding of the charge and

the elements of the offense. See Hanley v. State, 97 Nev. 130, 624 P.2d 1387 (1981). The overall record in this case clearly shows that FARMER knowingly and voluntarily waived his constitutional rights and privileges, there were no threats or promises of leniency, FARMER understood the consequences of the pleas and the range of punishment, and FARMER had an understanding of the charge and elements of the offense. At the initial arraignment, the court read the language of each and every count to FARMER who stated that he read and wrote the English language and had had an opportunity to read the indictment itself. He had also been previously furnished with a copy of the indictment. At the time he entered his guilty plea, FARMER acknowledged that he had discussed the matter with his attorney who had explained the elements of murder with the use of a deadly weapon and the offense of robbery with the use of a deadly weapon. FARMER also admitted what he had done to commit the crimes of murder with the use of a deadly weapon and robbery with the use of a deadly weapon. FARMER said that he had stabbed and killed the victim and that there had been a plan between him and others to rob the victim. There was a full recitation of facts by the prosecutor to which FARMER had no quarrel. Subsequently, evidence was presented during the penalty phase and FARMER still did not object to the voluntariness of his plea through the time he was formally sentenced.

The record also clearly demonstrated that FARMER was entering the pleas without any coercion and that he knew he was waiving his constitutional rights to a speedy and public trial by jury, to confront witnesses at trial and to subpoena

witnesses on his behalf, and to refuse to testify with the State not being able to comment on that refusal. FARMER was also aware that he had a right to counsel at all proceedings. The record demonstrates that FARMER knew he could receive a sentence of death for the murder and a total of thirty years for the robbery with the use of a deadly weapon and that he would not be eligible for probation. Most importantly, FARMER was informed and understood that he would go before a three-judge panel which would determine the sentence he would receive for the murder and that aggravating and mitigating circumstances would be presented and that evidence could be presented on his behalf.

The evidentiary hearing held in this matter certainly did not dispell any of the findings found above and only served to support these findings further. FARMER's trial counsel, Murray Posin, credibly testified that he had explained to FARMER the difference between a jury trial and a guilty plea with a three-judge panel. Posin also explained the evidentiary proceeding at the penalty hearing and explained aggravating and mitigating evidence. The evidentiary hearing also brought out the fact that FARMER had just gone through another jury trial within the previous year, after which he was convicted of murder, and, thus, was clearly aware of what a jury trial was all about. There is no merit to the claims that FARMER was unaware of the elements of the crimes to which he pled or that he was unaware of the penalty hearing procedures.

FARMER is also not entitled to relief based upon his claim that he was unaware of what was involved with the felony murder doctrine. As noted above, the specific charges had been read to

FARMER and he understood the elements of the crimes to which he pled. Moreover, the evidence adduced at the penalty hearing, and as shown in this record, supported findings of overwhelming evidence that FARMER engaged in premeditated murder as he did the actual killing. This is shown in the opinion of the Nevada Supreme Court. Even though there is no requirement for a plea of guilty to murder in this case that FARMER knew the specifics of the felony murder rule, it was inconsequential as he was clearly liable under the theory of direct and premeditated murder.

As a result of the above, this court finds that FARMER's guilty pleas were entered knowingly and voluntarily. Additionally, FARMER at no time after the entry of his pleas and before the formal imposition of sentence, asserted that his pleas were involuntary and he has essentially waived his right to assert that claim. See Director, Nevada State Prison v. Powell, 101 Nev. 736, 710 P.2d 73 (1985).

With regard to the claim that FARMER was convinced by his counsel that he had a better chance of avoiding the death penalty if he pled guilty and faced a three-judge panel, this court finds that claim to be unsupported by the record and the evidence. First of all, FARMER's former counsel credibly testified that he had explained the three-judge panel procedure to FARMER and stated his preference to try a case before a jury. Counsel also stated that he discussed with FARMER that it might be a three-judge panel which "would be better able to maintain their objectivity in terms of recognizing that there was a physical aberration" and that they might be less emotionally

disturbed by the nature of the homicide and FARMER's prior criminal activities. The key to the testimony was that counsel informed FARMER as to the alternatives available to him and that the ultimate decision was made by FARMER. On the other hand, FARMER testified at one point that he did not recall having been informed about aggravating and mitigating circumstances by his counsel. Yet the transcript clearly shows that he was so informed by the court at the time of the entry of his plea. It is also more logical and consistent with an attorney's duty that the options were explained to FARMER who was the one who made the ultimate decision about the waiver of his constitutional right to a jury trial. This court is convinced that the options were in fact presented to FARMER and that he made the decision and knowingly and voluntarily waived his right to a jury trial.

B. Claim of Ineffective Counsel.

FARMER first claims that his counsel was ineffective for not informing FARMER of the possible results of the guilty plea. This is refuted by the record and the evidence as noted above. Not only did counsel explain the results of the guilty plea, the court conducted a thorough and proper canvass in this regard.

The other claims of ineffective counsel are that this was counsel's first capital case, that counsel neglected several areas during cross examination of the primary witness at the penalty phase, and that counsel failed to present other mitigating evidence at the penalty hearing. This court has thoroughly reviewed the background of counsel found in this record and the manner in which he conducted the defense in this case. First of all, there was an extensive investigation conducted by counsel

who began representing petitioner approximately one year before the pleas were entered. He obtained and reviewed the complete transcript of the previous homicide trial out of Reno, after which FARMER was convicted of murder. Counsel reviewed the pre-sentence report and traveled to Reno to discuss the matter with FARMER's counsel for that case. Counsel also reviewed petitioner's criminal, medical and psychiatric history and obtained complete discovery from the prosecutor. FARMER's counsel also obtained the services of four psychiatrists, discussed the situation with petitioner and his family, and was prepared for both a guilt and penalty phase. In fact, counsel was ready to go to a trial by jury on the day FARMER decided to enter his guilty pleas.

As noted previously, counsel thoroughly informed FARMER of the evidence, of court procedures and of the potential results of a guilty plea. FARMER's trial counsel had been an attorney for more than thirty-five years and had had experience with criminal defense work, including murder cases. In this particular case, he attempted to negotiate with the prosecutor to avoid the death penalty for his client and the prosecutor refused to make any such deal. The record shows that counsel presented evidence at the penalty hearing and thoroughly cross-examined witnesses.

The presumption of the effectiveness of counsel has not been refuted by the conclusory claims made by FARMER. Petitioner failed to present any evidence to show how counsel neglected areas of cross-examination or what other evidence should have been presented at the penalty hearing. Because

counsel made a thorough investigation of the law and the facts, it is clear that the decisions he made in presenting evidence and cross-examining witnesses was tactical and these tactical decisions were clearly reasonable. Petitioner has presented no evidence to the contrary.

Petitioner weakly claimed that the female eye-witness "might have been considered an accomplice" which would warrant a jury trial and that expert psychiatric testimony should have been presented at the penalty hearing. These claims are not supported by the evidence. The prosecutor, William Koot, credibly testified at the evidentiary hearing that the female eye-witness was a juvenile, probably not an accomplice and, even if she was, there was overwhelming evidence connecting FARMER with the murder. There was also overwhelming evidence concerning FARMER's prior criminal history as well as regarding the aggravating factor that the murder was committed during the course of a robbery or burglary. Even assuming the truth of the testimony of FARMER and his mother regarding his alleged childhood injuries and treatment, the three-judge panel could reasonably believe that this was not a mitigating factor in light of FARMER's subsequent, extensive criminal history. Petitioner has presented no evidence to show that calling any other experts would have been helpful for him and nothing refutes the presumption that counsel made a tactical decision as to what evidence he would present. FARMER cannot overcome this presumption with mere speculation. He has failed to demonstrate attorney error or prejudice affecting his convictions or sentences. See Strickland v. Washington, 466 U.S. 668 (1984).

C. Prosecutorial Misconduct.

The final claim by FARMER set forth in his supplemental petition was that the prosecutor conducted misconduct at the penalty phase by arguing facts not in evidence and presenting evidence on aggravating circumstances not relevant to the case. This claim could have and should have been presented on direct appeal and petitioner has failed to demonstrate cause or prejudice for the failure. Additionally, there was no objection by counsel during the penalty phase. As such, petitioner is procedurally barred from bringing this claim. See Kimmel v. Warden, 101 Nev. 6, 692 P.2d 1286 (1985); Mercado v. State, 100 Nev. 535, 680 P.2d 305 (1984).

FARMER attempts to bootstrap his claims of prosecutorial misconduct by asserting that his counsel was ineffective for having failed to make the proper objections. As noted above, however, FARMER has failed to demonstrate that his counsel was ineffective. This is also true with regard to these specific claims. A simple failure to object does not amount to ineffective counsel. Additionally, here, FARMER has not demonstrated that any statements by the prosecutor regarding facts were untrue or why an objection should have been posed. It would certainly not be beneficial for an objection to be made regarding factual assertions which were not shown to be incorrect.

With regard to the claimed improper presentation of aggravating circumstances, the prosecutor discussed the facts surrounding FARMER's previous murder and kidnapping in Reno. This is found at page 463 to 465 of the Transcript in Exhibit E attached to respondent's answer. The prosecutor stated that he

did not believe that this was technically a proper aggravating circumstance but that the court could make that decision. The three-judge panel only found the aggravating circumstances of murder in the course of a robbery and murder in the course of a burglary. Thus, it is clear that FARMER was not prejudiced in that regard. The fact that the prior homicide was discussed by the prosecution was, in fact, proper as it went to the character of petitioner and was relevant towards sentencing. Again, FARMER has failed to demonstrate attorney error or prejudice and his failure to object at the time cannot be excused.

IT IS THEREFORE HEREBY ORDERED that the petition for writ of habeas corpus be denied. The stay of execution previously entered is vacated. This order shall constitute the findings of fact and conclusions of law of this court. The clerk of the court is ordered to prepare immediately for possible appeal all of the pleadings, exhibits and transcripts on file in this action and, upon the filing of a notice of appeal, transmit the record to the supreme court forthwith.

DATED this 20th day of March, 1987.

Michael E. Fondi

DISTRICT JUDGE

APPENDIX D

175.255 Court to give judgment without regard to technical errors. After hearing the appeal, the court shall give judgment without regard to technical error or defect which does not affect the substantial rights of the parties.

200.033 Circumstances aggravating first degree murder. The only circumstances by which murder of the first degree may be aggravated are:

1. The murder was committed by a person under sentence of imprisonment.
2. The murder was committed by a person who was previously convicted of another murder or of a felony involving the use or threat of violence to the person of another.
3. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.
4. The murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit, any robbery, sexual assault, arson in the first degree, burglary or kidnaping in the first degree, and the person charged:
   (a) Killed or attempted to kill the person murdered; or
   (b) Knew or had reason to know that life would be taken or lethal force used.
5. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.
6. The murder was committed by a person, for himself or another, for the purpose of receiving money or any other thing of monetary value.
7. The murder was committed upon a peace officer or fireman who was killed while engaged in the performance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or fireman. For purposes of this subsection "peace officer" means sheriffs of counties and their deputies, marshals and policemen of cities and towns, the chief and agents of the investigation division of the department of motor vehicles and public safety, personnel of the Nevada highway patrol, and the director, deputy director, correctional officers and other employees of the department of prisons when carrying out the duties prescribed by the director of the department.
8. The murder involved torture, depravity of mind or the mutilation of the victim.
9. The murder was committed upon one or more persons at random and without apparent motive.

200.035 Circumstances mitigating first degree murder. Murder of the first degree may be mitigated by any of the following circumstances, even though the mitigating circumstance

is not sufficient to constitute a defense or reduce the degree of the crime:

1. The defendant has no significant history of prior criminal activity.
2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
3. The victim was a participant in the defendant's criminal conduct or consented to the act.
4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.
5. The defendant acted under duress or under the domination of another person.
6. The youth of the defendant at the time of the crime.
7. Any other mitigating circumstance.

ORIGINAL

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No. 88-5343

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROBERT J. FARMER, Petitioner,

v.

DIRECTOR OF NEVADA DEPARTMENT OF PRISONS,

Respondent.

PETITIONER'S REPLY BRIEF

TERRI STEIK ROESER
Nevada State Public Defender

JEFFREY M. EVANS*
Appellate Deputy
308 N. Curry, Room 200
Carson City, Nevada 89710
Phone: (702) 885-4880

ATTORNEYS FOR PETITIONER

*Counsel of Record

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ARGUMENT

I. THE DECISION BELOW DID NOT REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Respondent asserts that the decision below rested on an adequate and independent state ground. Indeed, Respondent claims that this assertion is an "inescapable conclusion". Brief in Opposition at 10. Respondent is wrong.

Missing from Respondent's analysis is any mention of the presumption under Michigan v. Long, 463 U.S. 1032, 1042 (1983): this Court presumes the absence of an adequate and independent state ground when the existence of such a ground is "not clear from opinion itself". In its decision, the Nevada court addressed the retroactivity of Booth v. Maryland, 482 U.S. ___, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987) cited federal precedent, and declined to apply Booth retroactively "absent the high court's direction". Petition at 2a (Order Dismissing Appeal set forth in appendix). It is not "clear from the opinion itself" that the denial of relief to Farmer rested on the state ground of procedural default. Therefore, under Michigan v. Long, the presumption is that the decision did not rest on an adequate and independent state ground but on the federal ground. Accordingly, this Court has jurisdiction to grant the writ.

II. THE QUESTION OF BOOTH'S RETROACTIVE APPLICATION ON COLLATERAL REVIEW IS WITHIN THE AMBIT OF RULE 17.

Respondent argues that Farmer is "disingenious" [sic] in seeking this Court's review and has failed to state reasons under Rule 17 for granting review. Brief in Opposition at 17 1(c). Respondent is again wrong.

As Farmer made clear in his petition, he is seeking review on the basis that the "question of Booth's retroactivity is a question that has not, but should be, settled by this Court". Petition at 8. This is one of the enumerated bases in Rule 17.1(c). Perhaps inadvertently, Respondent has apparently conceded the "certworthiness" of this question: Respondent admits that "the issue of [Booth's] retroactivity ... may subsequently present an important question of federal constitutional law" that "must be decided some time ...." Brief in Opposition at 8, 20. Farmer submits that the issue is squarely presented in this case.

III. THE QUESTION OF HARMLESS ERROR IS PROPERLY DEFERRED UNTIL BRIEFING ON THE MERITS.

Respondent argues that the admission of victim impact information at Farmer's penalty hearing was "harmless beyond a reasonable doubt". Brief in Opposition at 7. Whether such an error can ever be deemed harmless is unclear. Nowhere in the Booth decision did this Court engage in a harmless error analysis: The risk that victim impact information influenced the capital sentencing decision was itself sufficient to invalidate

Booth's death sentence. Booth 96 L.Ed.2d at 448. See also People v. Simms, 121 Ill.2d 259, 520 N.E.2d 308, 314-315 (1988).

Assuming arguendo that a Booth error could sometimes be harmless, the question of harmless error is not properly addressed at this point. Determining whether the introduction of victim impact information at Farmer's penalty hearing was harmless beyond a reasonable doubt requires a review of the entire record: as Respondent himself admits, "review of the entire sentencing proceeding would have to occur in order to make a determination as to whether or not a finding of harmless error is appropriate". Brief in Opposition at 12. The record of proceedings remains in the Nevada Supreme Court. The question of harmless error relates to the merits of Farmer's case and should be addressed in briefs after certiorari is granted.

CONCLUSION

For the above reasons, petitioner Farmer asks that the petition for a writ of certiorari be granted and this matter set for briefing on the merits.

Respectfully submitted,

TERRI STEIK ROESER
Nevada State Public Defender

By: _____

JEFFREY M. EVANS*
Appellate Deputy Public Defender
198 N. Curry, Room 200
Carson City, Nevada 89710
Phone: (702) 885-4880
*Counsel of Record

SUPREME COURT OF THE UNITED STATES

ROBERT J. FARMER *v.* GEORGE SUMNER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

No. 88-5343. Decided February 27, 1989

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case.

Even if I did not hold these views, however, I would still grant this petition. The petitioner's argument here is that evidence was admitted at the penalty phase of his trial in violation of *Booth* v. *Maryland*, —— U. S. —— (1987), where we held that the Eighth Amendment prohibits a capital sentencing jury from considering victim impact statement evidence. This argument is hardly frivolous. The prosecutor at petitioner's trial described at some length the devastating emotional impact upon the mother of the man petitioner killed. He told the jury, among other things, that petitioner "shattered some other lives psychologically"; that the victim's mother has "repeated nightmares, crying, and I can see the crying for myself. Extremely emotionally traumatic"; and that petitioner "never thought about the victims. Never gave the families of the victims a thought." The Nevada Supreme Court, however, refused to consider the merits of this *Booth* claim. It held that petitioner's claim was barred because he had not raised it below, and because this Court has given no indication that *Booth* operates retroactively.

I am unpersuaded by these arguments. The fact that petitioner did not raise a *Booth* claim below rather obviously reflects the fact that *Booth* had not been handed down at the time. Petitioner should not be penalized for not being prescient. As for the Nevada court's second ground for rejecting Booth's appeal, I believe that the issue of whether *Booth* should have retroactive operation very much warrants this Court's attention. The abusive use by the prosecutor in this case of references to victim impact—information we held in *Booth* to be thoroughly irrelevant in capital sentencing proceedings, see —— U. S., at ———provides a graphic illustration of the harm done by decisions, like the one below, allowing *Booth* to be applied only prospectively.